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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

No. 772

SIGNAL OIL AND GAS COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered November 20, 1956. Said judgment affirmed an Opinion and Order of the Federal Power Commission issued November 28, 1955, under review by the Court of Appeals pursuant to Section 19(b) of the Natural Gas Act.

### OPINIONS BELOW

The Federal Power Commission's Opinion No. 288 and Order issued November 28, 1955, granting a certificate of public convenience and necessity, and its

Order Denying Rehearing issued January 13, 1956, are unreported and are printed in the Joint Appendix at pages 433a-468a and 494a-499a.[1]

The Opinion of the Court of Appeals is reported at 238 F. (2d) 771, and is printed in Appendix A (pp. 1a-7a). The judgment of the Court of Appeals is unreported and is printed in Appendix B (pp. 7a-8a).

## JURISDICTION

The judgment of the Court of Appeals, affirming the Opinion and Order of the Federal Power Commission, was entered November 20, 1956.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

## QUESTIONS PRESENTED

Petitioner filed an application for a certificate of public convenience and necessity covering a sale of natural gas made by it and also filed the twenty-year contract for such sale of gas as an initial rate schedule. Both the certificate application and the rate schedule were properly filed with the Federal Power Commission in accordance with the latter's regulations under the Natural Gas Act governing such matters, and applicable to an "independent producer", a class of natural gas company to which petitioner belongs. At the conclusion of formal hearings held pursuant to Sections 7(c) and (e) of the Natural Gas Act, governing the grant or denial of certificates of public con-

[1] References marked Appendix A, B, and C are to the Appendices to this Petition; and "J. App." to the Joint Appendix of the Parties before the Court below.

venience and necessity, the Commission issued to petitioner a certificate upon condition that petitioner file with the Commission a new rate schedule providing for a specific rate different from and lower than the rate set forth in petitioner's initial rate filing. In so doing, the Commission failed to find that the rate so prescribed was the "just and reasonable" rate. Compliance with such condition would require petitioner to negotiate with the purchaser a new twenty-year contract providing for the lower rate specified by the Commission.

The questions presented are:

(1) Do the certificate provisions of Sections 7(c) and (e) of the Natural Gas Act authorize the Federal Power Commission to prescribe a rate for a natural gas company independently from and without adhering to the precise and explicit procedures and standards established by Congress in Section 5(a) of the Act which requires the Commission at the conclusion of a rate investigation to determine the just and reasonable rate and to fix the same by order?

(2) Has the Federal Power Commission deprived petitioner of its property without due process of law by prescribing arbitrarily a rate for petitioner different from and lower than the initial rate established in petitioner's gas sales contract without according to petitioner a fair and adequate hearing with respect to such rate as required by Section 5(a) of the Natural Gas Act and the Fifth Amendment to the Constitution of the United States?

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case arises under the Constitution of the United States and the Natural Gas Act, 52 Stat. 821-833 (1938), as amended 56 Stat. 83-84 (1942), 61 Stat. 459 (1947), 68 Stat. 36 (1954), 15 U.S.C. Sec. 717-717w (1952). The pertinent provision of the Constitution is the Fifth Amendment, the sections of the Act here pertinent are Sections 5a, 7(c) and (e), and the pertinent sections of the Commission's Regulations are Sections 154.92(b), 154.93, 154.101 and 157.23-27, which are printed in Appendix C (pp. 8a-16a).

## STATEMENT

Petitioner owns and operates the Fox gasoline plant in Carter County, Oklahoma. Petitioner purchases casinghead gas, which is produced in association with crude oil from oil wells, from oil and gas producers in the immediate vicinity of this plant and moves such casinghead gas through a network of gathering lines to the plant for processing. In the processing operation, petitioner extracts natural gasoline, certain liquefiable hydrocarbons and impurities contained in the casinghead gas. The extraction operation leaves a remainder which is natural gas and is frequently called residue gas. (J. App. 9a-38a).

We are concerned here only with the residue gas which is sold by petitioner to Cities Service Gas Company[2] for ultimate transportation in interstate com-

[2] For convenience the following short titles will be used: Federal Power Commission—Commission; Cities Service Gas Company—Cities Service; Oklahoma Natural Gas Company—Oklahoma Natural; Lone Star Gas Company—Lone Star. Certificates of public convenience and necessity are sometimes referred to as "Certificates".

merce and resale under the provisions of a gas sales contract dated July 6; 1954 (J. App. 167a). This contract has a term of twenty (20) years; it provides for an initial price of twelve cents (12¢) per one thousand cubic feet (Mcf) of gas; and it contemplates initial deliveries of approximately 30,000 Mcf of residue gas per day at a required delivery pressure of 800 pounds per square inch gauge. Deliveries under this contract were commenced in the latter part of October 1954, pursuant to temporary authorization requested by and granted to petitioner and Cities Service on August 25, 1954, pending final action on their respective applications. (J. App. 228a, 229a).

To carry out the provisions of the gas sales contract Cities Service and petitioner filed, on August 24, 1954, separate but related applications for certificates of public convenience and necessity under Section 7(c) of the Natural Gas Act. Petitioner, as an independent producer,[3] requested authorization to sell natural gas in interstate commerce to Cities Service for resale (J. App. 221a). Cities Service sought authorization to construct and operate certain pipeline and metering facilities, and to transport in interstate commerce the residue gas purchased from the Fox plant for its general system use and ultimate resale. On September 7, 1954, as required by Section 4 of the Act and the

[3] Section 154.91 of the Commission Regulation (18 CFR 154.91(a)) defines an "independent producer" as any person "who is engaged in the production and gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale but who is not primarily engaged in the operation of an interstate pipeline." It is a new class of natural gas company established by the Commission following this Court's decision, on June 7, 1954, in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672.

Commission's regulations, petitioner also filed with the Commission the gas sales contract as petitioner's initial rate schedule (J. App. 317a).

On September 20, 1954, the Commission consolidated the certificate applications of Cities Service and petitioner for purposes of hearing and set October 28, 1954, as the date for the commencement of such hearing. This order of the Commission stated specifically that the hearing was being held pursuant to Section 7 of the Act. No provision was made in this order for an investigation of petitioner's initial rate under Section 5(a) of the Act (J. App. 246a).

The participants in the hearing were the two applicants, Counsel for the Staff of the Commission, nine municipalities served with gas from the Cities Service system,[4] acting as a group, and two gas-buying pipeline competitors of Cities Service which had attempted to purchase the residue gas output of the Fox plant, namely, Oklahoma Natural and Lone Star. The interveners sought to have the Commission either modify and reduce the price at which petitioner would sell gas to Cities Service, or deny petitioner's application for a certificate *in toto*.

At the hearing petitioner introduced testimony and evidence establishing that it had complied with the requirements of Section 7(e) of the Act. Petitioner also submitted in evidence its gas sales contract and testimony showing that such contract was the product

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[4] The Cities of Kansas City, Missouri; Kansas City, Kansas; Springfield, Missouri, and the Board of Public Utilities of Springfield; Joplin, Missouri; St. Joseph, Missouri; Leavenworth, Kansas; Atchison, Kansas; Carthage, Missouri; and Independence, Missouri. These municipalities did not participate in the proceedings before the Court of Appeals.

of arm's length bargaining (J. App. 17a). Petitioner's testimony and evidence was in complete accordance with the only substantive provision contained in the Commission's Regulations required to support a certificate application filed by an independent producer.[5]

Neither the municipalities nor Commission Staff Counsel offered any testimony or evidence. Oklahoma Natural and Lone Star offered rebuttal cases, but their evidence cannot fairly be said to have been designed or intended to enable the Commission to determine a just and reasonable rate for petitioner's sale of residue gas to Cities Service (J. App. 135a). Their cases consisted primarily of testimony and evidence showing that these two pipeline competitors of Cities Service were paying currently a price of ten (10) cents per Mcf for residue gas purchased under long term contracts from gasoline plants in Southern Oklahoma. Their evidence also showed that this price of ten (10) cents per Mcf was voluntarily established by them at the beginning of 1952, more than two years before petitioner's plant was built and placed in operation and would increase, pursuant to the terms of their contracts, at stated intervals subsequent to December 31, 1957. These interveners contended that failure to require petitioner to reduce its rate to ten cents (10¢) per Mcf might necessitate their having to pay higher prices for gas purchased by them. (J. App. 98a-141a).

**The Commission's Findings and Opinion**

On the basis of the evidence of record, the Commission unanimously held that the petitioner was a quali-

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[5] Section 157.25, Exhibit B, of the Commission's Regulations under the Natural Gas Act which is printed in Appendix C.

fied applicant for a certificate. It found, as required by Section 7(e) of the Act, that petitioner "is able and willing properly to do the acts and perform the service proposed" and that the proposed sale of residue gas to Cities Service is "required by the public convenience and necessity." (J. App. 454a).

In addition, a majority of the Commission found that "public convenience and necessity" required that the certificate issued to petitioner be conditioned upon the filing of a new rate schedule providing for a rate of ten (10) cents Mcf in lieu of the rate of twelve (12) cents Mcf provided in petitioner's gas sales contract. Chairman Kuykendall and Commissioner Digby dissented. They stated, in separate opinions, that they would grant petitioner a certificate without modification of petitioner's rate and questioned the propriety and legality of the majority's action (J. App. 456a-466a). In its opinion, after reciting what it believed to be the nature of the relationship of petitioner's rate to the self-established rate paid by Oklahoma Natural and Lone Star, the majority of the Commission said: "We wish clearly to state that in conditioning the order to follow to provide for a rate of ten (10) cents per Mcf, we do not find that this rate is the just and reasonable rate within the meaning of Section 4 of the Act * * *." "The ten (10) cent rate is not a definitive rate, and our action designedly is an interim measure calculated best to protect the public interest in a timely manner." (J. App. 451a). Additionally, the opinion of the majority held that a Section 5(a) hearing to investigate petitioner's rate for the purpose of determining a just and reasonable rate was too time consuming and administratively difficult. (J. App. 450a-451a).

### Decision of the Court of Appeals

After the Commission issued its order denying rehearing,[6] a petition was filed with the Court of Appeals for review of the Commission's Opinion and Order pursuant to Section 19(b) of the Act. The Court of Appeals affirmed the Commission's order. In so doing, it did not discuss the relationship between the Commission's power to attach "reasonable terms and conditions" to the grant of a certificate under Section 7(e) of the Act and the Commission's power to investigate and modify initial rates only under Section 5(a) of the Act. The Court held that the Commission's power to impose "rate" conditions had already been upheld in several cases decided by the courts and that it failed to see the difference between the rate condition involved in this case and those in earlier cases which had been judicially approved. These cases are discussed at pages 15-17 herein. Moreover, the Court of Appeals' opinion does not indicate that it gave any consideration to petitioner's claim that it had been denied due process of law by the Commission.

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

### 1. This Case Involves an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

We are concerned here with defining the proper relationship between the certificate or "licensing" provisions of Sections 7(c) and (e) of the Act and the basic rate regulatory authority and duty of the Com-

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[6] Simultaneously with the filing of its Application for Rehearing (J. App. 469a), on December 16, 1955, petitioner also filed with the Commission a motion requesting a stay of the Commission Opinion No. 288 and order which motion was granted by order issued December 27, 1955 (J. App. 491a). This stay is still in effect.

mission under Section 5(a) of the Act. In this certificate proceeding the Commission has held that Section 7(e) authorizes it to modify and prescribe a rate for a natural gas company independently from, and without regard to, the limitations placed upon the exercise of its rate regulatory power under Section 5(a). The Commission claims as the source of this independent rate regulatory authority the provision in Section 7(e), which authorizes the Commission to "attach reasonable terms and conditions" to the grant of a certificate.[7]

This Court has never decided on its merits a case which dealt with the extent of the certificate authority of the Commission under Sections 7(c) and (e) or with a certificate issued by the Commission.[8]

The establishment of the proper relationship between the certificate and rate regulatory functions of the Commission is of substantial national importance.

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[7] Certificate conditions are discussed in the following cases: *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 169 F. (2d) 881 (C.A.D.C., 1948); *Alabama-Tennessee Natural Gas Company* v. *Federal Power Commission*, 203 F. (2d) 494 (C.A. 3, 1953); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 232 F. (2d) 467 (C.A. 3, 1956); *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492 (1955); *Public Utilities Commission of Connecticut* v. *Federal Power Commission*, 205 F. (2d) 116 (C.A. 3, 1953); *Cia Mexicana De Gas, S.A.* v. *Federal Power Commission*, 167 F. (2d) 804 (C.A. 5, 1948).

[8] Certiorari has been sought and denied in three cases decided by Courts of Appeal dealing with problems arising under Section 7. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 219 F. (2d) 729 (C.A. 3, 1955), *cert. denied*, 349 U.S. 945 (1955); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 169 F. (2d) 881 (C.A.D.C.), *cert. denied* 335 U.S. 854 (1948); and *Home Gas Company et al.* v. *Federal Power Commission*, 231 F. (2d) 253, *cert. denied* 352 U.S. 831 (1956).

Rate regulation involves an invasion of the property rights of the person affected. Consistent with the constitutional prohibition against an unlawful taking of property, Congress, in the Natural Gas Act, has carefully spelled out both the procedural mechanics and the substantive criteria which must be observed by the Commission in modifying and prescribing the rate of a natural gas company. Thus Congress, in Section 5(a), has directed the Commission first, after hearing, to find and determine the just and reasonable rate and then to fix the same by order. On the other hand, the certificate provisions of Sections 7(c) and (e) are not related to any vested or property right of an applicant but instead involve an exercise of discretion by the Commission concerning the ability and willingness of the applicant to perform, as well as matters of public policy and public interest. The record developed in a certificate proceeding is not intended to serve as a basis for determining and prescribing a rate. And in this case, the Commission has expressly failed to find that the rate prescribed for petitioner is the "just and reasonable" rate as required by Section 5(a).

The present certificate provisions of Sections 7(c) and (e) were added to the Natural Gas Act in 1942 and were designed primarily to give the Commission a separate and distinct regulatory jurisdiction over certain then unregulated construction and extension of natural gas pipelines.[9] The power of the Commission under Section 7(e) to attach "reasonable terms and conditions" to certificates was intended as no more than a supplement to the Commission's authority to

[9] Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 5249, 77th Cong., pp. 81-2 (1941).

issue or deny certificates. It cannot properly be construed as vesting in the Commission an entirely separate rate regulatory power and authority which may be exercised independently from the basic rate regulatory authority of the Commission under Section 5(a). *Cf. United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

A harmonious interpretation of the certificate provisions of Sections 7(c) and (e) with the rate regulatory provisions of Section 5(a) requires that the "conditioning" power of the Commission be construed, so far as rate regulation is concerned, as a means of implementing and augmenting, rather than supplanting, the explicit grant of rate regulatory authority in Section 5(a). Such an interpretation would eliminate the possibility of conflict between these two separate and distinct regulatory functions of the Commission and would be in accord with this Court's decision in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949), where the Court said:

> "If possible all sections of the Act must be reconciled so as to produce a symmetrical whole. We cannot attribute to Congress the intent to grant such far-reaching powers as implicit in the Act when that body has endeavored to be precise and explicit in defining the limits to the exercise of federal power."

The legislative history of the 1942 amendment[10] indi-

[10] House Report No. 1290, 77th Cong., pp. 2-3. In respect to rate conditions, the House Interstate and Foreign Commerce Committee referred specifically only to a rate condition in the certificate granted to Louisiana-Nevada Transit Company in Docket No. G-122, 2 FPC 546 (1939), affirmed *sub nom. Arkansas Louisiana Gas*

cates that the Congress intended that the Commission, could, in its discretion, scrutinize the characteristics of the rate structure of an interstate gas pipeline certificate applicant in passing upon its certificate application. But the power to scrutinize is not equivalent to the power to modify and fix rates. The total absence of even the word "rates" from Sections 7(c) and (e) is significant in this regard.

Nor has the Commission in the past construed Section 7(e) as giving it a separate and distinct rate regulatory authority independent of that contained in Section 5(a). For example, in the Commission's 1949 Annual Report to Congress, at page 114, the Commission practice in regard to the extent rates are considered in certificate proceedings is explained as follows:

> "The rate proposals in connection with new pipelines and services must be carefully analyzed to ascertain whether the statutory requirements of reasonableness and nondiscrimination are met.
>
> "* * * Any evident departures from the statutory requirements and established practices with respect to rates requires conditioning any certificate granted *so that compliance with the rate provisions of the law may be effected.*" (Emphasis Supplied)

Thus the Commission itself has clearly recognized the limitations surrounding the exercise of its power under the certificate provisions of Sections 7(c) and (e), and that it, as well as the natural gas companies

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*Co.* v. *Federal Power Commission*, 113 F. (2d) 281 (C.A. 5, 1940). That rate condition held the applicant to the precise rate proposed in its certificate application but did not modify or reduce that rate.

subject to its jurisdiction, has the duty to comply with the rate regulatory provisions of Section 5(a) of the Act.

Moreover, in the innumerable certificates issued by the Commission since the 1942 amendment to the Natural Gas Act, petitioner has been unable to find a case in which the Commission has prescribed, in a rate condition, a specific rate lower than that proposed by the certificate applicant for the service sought to be authorized under the certificate. To the contrary, modification or lowering of a rate proposed to be charged for the service sought to be authorized under a certificate has been accomplished only after the Commission has invoked and complied with the provisions of Section 5(a) or has informally obtained the applicant's acquiescence thereto. In the instant case the Commission has not acted consistent with its past practice.

The instant case was the first formal contested certificate proceeding involving an independent producer scheduled for hearing by the Commission. To the best of petitioner's knowledge, the Commission has not, in the hundreds of certificate proceedings involving independent producers since the instant case, issued a certificate to any independent producer on condition that the independent producer applicant file a specific lower rate than that initially established in his gas sales contract.

Careful and reasoned analysis of what has actually been the Commission's practice makes it clear that the Commission has not used the power conferred by Section 7(e) of the Act to accomplish the objectives obtainable only by observance of both the procedural

and substantive requirements of Section 5(a).[11] Acceptance of the thesis enunciated by the Court of Appeals (Appendix A, p. 5a) that "interpretation of its authority by the Commission through the years must be given considerable weight" when tested against what has been the actual practice of the Commission will confirm that the Commission has treated petitioner differently than it has treated all other certificate applicants in that in the instant case the Commission is attempting to accomplish under the guise of the certificating power contained in Section 7(e) what can only properly be obtained by observance of the requirements of Section 5(a).[12]

In reviewing the judicial decisions which it indicated were decisive of the issues in this case, the Court of Appeals ignored the fact that the rate condition being reviewed in such other decisions did not *per se* effect a reduction or modification of a rate but instead served only to hold open the question of rates until such time as the Commission itself could comply with

[11] *Cf.* The Commission's 1952 Annual Report to Congress, pages 110-111. An example of a case in which the Commission conditioned a certificate by requiring the filing of "a definite and specific rate" is discussed in footnote 13 *infra*. The other three types of rate conditions referred to in this Annual Report do not involve a modification, let alone a lowering, of rates.

[12] It is difficult to understand the significance of the reference by the Court of Appeals to the fact that the Natural Gas Act was amended in 1954 (See App. A, p. 6a). That amendment added Section 1(c) to the Act. 68 Stat. 36 (1954), 15 U.S.C. 717(c). Certainly, when Congress amended Section 1 of the Act, the fact that it did not also amend Section 7 expressly to repudiate the Commission's own interpretation of its powers under Section 7, cannot validly be urged as an argument in support of the contention that the conditioning power of Section 7(e) supplants the rate regulatory authority contained in Section 5(a).

the rate regulatory provisions of the Act. Thus in *Alabama-Tennessee Natural Gas Company* v. *Federal Power Commission,* 203 F. (2d) 494 (C.A. 3, 1953) and *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission,* 232 F. (2d) 467 (C.A. 3, 1956), final certificates were issued to the respective applicants on condition that each applicant file "a tariff satisfactory to the Commission at least six months prior to the commencement of operation". It is clear that this type of rate condition does not *per se* either modify a rate or require that any particular rate be filed. Approval by the courts of the rate conditions involved in such cases is not authority for the imposition of the type of rate condition involved in this case. The Commission did not attempt to modify the tariffs filed by the respective certificate applicants in those cases, until after the Commission had first invoked and complied with the provisions of Section 5(a) of the Act.[13] Such compliance consisted of

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[13] Thus as respects *Alabama-Tennessee,* paragraph B of the Commission's order issued December 27, 1951, giving notice of the rate hearing provides in pertinent part as follows: "(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by Sections 5, 7 and 15 of the Natural Gas Act, and pursuant to the conditions of paragraph B of the Commission's order issued herein on July 2, 1948 and June 16, 1950, a public hearing be held commencing on January 14, 1952 to determine the just, reasonable, non-preferential or non-discriminatory rate, charge, classification, rate regulation, service, practice or contract to be thereafter observed and in force by Alabama-Tennessee for sales of natural gas for resale in interstate commerce and to fix the same by order." This order is reported at 10 F.P.C. 1638-1640 (1951).

Likewise as regards *Panhandle Eastern,* paragraph (B) of the Commission's order issued July 11, 1950 giving notice of the rate hearing provides in pertinent part: "(B) Pursuant to the provisions of Sections 3, 4, 5, 7 and 15 of the Natural Gas Act, as amended, and in accordance with the terms of this Order a public

holding a rate hearing, determining the just and reasonable rate, and finally, fixing the same by order. Both the rate hearing and the determination of the just and reasonable rate by the Commission took place many months after the final certificates had been issued to the applicants there involved. It is also worthy of note that the appeals in those cases were taken from the orders issued at the conclusion of the rate hearings and not from the orders granting the

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hearing be held commencing August 14, 1950 with respect to the matters involved and the issues which by this order have been consolidated for hearing". Preceding portions of the order listed nine separate issues to be considered. Five of the issues concerned the establishment of "just and reasonable rates" and the form of Panhandle Eastern's tariff. This order is reported at 9 F.P.C. 924-931 (1950).

The Court of Appeals mentions *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 169 F. (2d) 881 (C.A.D.C. 1948) in which Panhandle, an intervener before the Commission, sought review of a certificate granted to Michigan Wisconsin Pipe Line Co. containing a rate condition identical with the rate condition in the *Alabama-Tennessee* case. Panhandle claimed the certificate was invalid because in the certificate hearing there was no proof or finding that the proposed rate was satisfactory. The Court said such proof and findings were not necessary to the issuance of a certificate. Later the Commission held rate hearings in which a "just and reasonable rate" was determined for Michigan Wisconsin Pipe Line Co.

The Court also refers to *Public Utilities Commission of Conn.* v. *Federal Power Commission*, 205 F. (2d) 116, 120 (C.A. 3, 1953), but that case is not related to any issue in this case. The case involved a request by Transcontinental Gas Pipe Line Company to be relieved of its obligations under a certificate previously issued to it by the Commission. The Court held that the Commission had authority under the Natural Gas Act to grant such a request. The original certificate authorized construction of certain facilities by Transcontinental on condition that it charge no higher rates than it had proposed in the proceedings and which it had previously agreed to file (See *Tennessee Gas Transmission Co., et al.*, Docket No. G-1248, et al., 9 F.P.C. 262, 286 (1950). See too, footnote 11, *supra*.

certificates containing the rate conditions so that the validity of the rate conditions was not the basic issue presented.

The effect of the instant rate condition is a far more definitive determination with respect to petitioner's rate than the Commission intended. The Commission assumed that petitioner was free to file, under the provisions of Section 4(e) of the Act, a change in rates whenever it so desired (J. App. 452a). But this assumption is plainly contrary to the fact. Compliance with the rate condition would necessitate negotiation of a new twenty (20) year contract by petitioner with Cities Service providing for the rate specified by the Commission. The present contract does not permit petitioner to change the price and it is more than doubtful that a newly negotiated contract would extend such a privilege to petitioner. In the absence of mutual agreement to that effect, petitioner, in view of this Court's decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* cannot unilaterally effect a change in rate.

Moreover the decision of the Court of Appeals in this case reveals that it erred in assuming that petitioner sought to challenge the Commission's power to impose *all* rate conditions. This is plainly not the fact. Petitioner challenges only the Commission's power to impose those rate conditions which *per se* modify rates without regard to the procedural requirements and substantive criteria of Section 5(a) of the Act.

The failure of the Court of Appeals in this case to construe the provisions of Sections 7(c) and (e) on the one hand, and Section 5(a) on the other, so as to

avoid a conflict between them and its blanket endorsement of all rate conditions without regard to the limitations imposed by Section 5(a) upon the Commission's power to modify and lower rates, gives the Commission unlicensed power to substitute its own standards and criteria respecting the regulation of the rates of natural gas companies for the explicit standards established by Congress in Section 5(a).

As a consequence of the Court of Appeals' decision an applicant for a certificate may be deprived of the right to defend against an invasion of his property, may be denied the right to enter, at the proper time, a plea of confiscation and may have an arbitrary and capricious rate fixed by the Commission on the basis of a record which was never intended to prove or disprove the justness and reasonableness of its rate. Such unlimited power in the hands of an administrative body is repugnant to the basic principles of a system of constitutional government.

**2. The Court of Appeals Has Decided a Federal Question in Conflict With Applicable Decisions of This Court.**

The decision of the Court of Appeals sanctions an arbitrary reduction of petitioner's rate without a full and adequate hearing in respect thereto and thus petitioner has been deprived of its property without due process of law.

It is essential to due process of law, as this Court stated in *Morgan* v. *United States,* 304 U.S. 1 (1938) that:

> "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be

fairly advised of what the Government proposes and to be heard on its proposals before it issues its final command."

In this case petitioner has not been afforded a reasonable opportunity to know that the Commission proposed to modify and reduce the rate established in its twenty year gas sales contract. The record shows that neither petitioner, the interveners, nor counsel for the Staff of the Commission were advised that the Commission proposed to fix a rate in this proceeding for petitioner's sale of gas to Cities Service. The Commission itself gave no indication of its intentions until it issued a final certificate containing the rate condition here complained of, which modified and reduced petitioner's rate.

Despite the fact that petitioner had already filed its twenty year contract with the Commission as a rate schedule, and despite the fact that one of the interveners had protested the filing of such rate schedule, the Commission never set down for hearing the question of the lawfulness of petitioner's rate, as required under Section 5(a) to support a rate determination by the Commission. If the Commission had done so, petitioner would have been afforded an opportunity to know what the Commission proposed to do.

Instead of the foregoing the Commission issued an order stating only that it proposed to hold a hearing pursuant to the certificate provisions of Section 7 of the Act, respecting the matters and issues presented by petitioner's certificate application. (J. App. 246a).

As more fully described in the statement *supra*, such a hearing was held. At the hearing the position of the interveners was clear. The interveners were

seeking either a modification of petitioner's rate or a denial of petitioner's application. The counsel for the Staff of the Commission took no position in respect of petitioner's rate. He indicated that he was interested in developing all of the facts and that he assumed petitioner was aware of the issues presented by a certificate application under Section 7 of the Act (J. App. 92a-93a). However, after the hearing had ended and there was no further opportunity to present testimony and evidence, counsel for the staff filed a brief with the presiding examiner in which for the first time he argued that petitioner's rate should be reduced by means of a condition to the certificate to be issued to petitioner.

The presiding examiner recommended the issuance of a certificate to petitioner without modification of petitioner's rate. He based his recommendation primarily on the fact that a certificate hearing was not equivalent to a rate hearing and hence deprived petitioner of the full measure of the "procedural amenities" afforded to one whose rate is being investigated pursuant to the rate regulatory provisions of the Act (J. App. 339a-340a).

Finally, after exceptions were filed by the interveners and counsel for the Staff and oral argument was had before the full Commission, a majority of the Commission issued an order granting a certificate to petitioner on condition that petitioner file a specific different and lower rate. The majority's opinion categorically stated that this lower rate was not the just and reasonable rate which is required to be prescribed by Section 5(a) of the Act.

Petitioner submits that the order of September 20, 1954 giving notice that the Commission would hold

a hearing pursuant to Section 7 of the Act with respect to petitioner's certificate application (J. App. 246a) does not constitute notice that the Commission proposed to hold a rate investigation with respect to the rate set forth in the gas sales contract which petitioner had filed with the Commission as a rate schedule.

The "savings clauses" contained in the Commission's telegraphic temporary authorization of August 25, 1954 (J. App. 328a), the Commission's letter of acceptance of rate filing dated December 2, 1954 (J. App. 319a) and Section 154.101 of the Commission's Regulations (Appendix C) do not constitute notice that in a certificate proceeding the Commission will investigate a rate and prescribe a specific different lower rate. Properly, all that these various savings clauses assure is that issuance of a certificate shall not be a bar to the Commission's proper exercise of its rate regulatory functions at the proper time and in the proper manner and conversely that acceptance of a rate for filing does not insulate that rate from further proper regulation or act to relieve from the necessity of obtaining a final certificate authorizing the making of the sale to which the rate applies.

Nor would it be proper to infer such notice from the order of the Commission dated October 18, 1954 permitting intervention to Oklahoma Natural (J. App. 300a). Oklahoma Natural had filed both a protest against petitioner's rate schedule and a petition to intervene in the certificate proceeding. In the latter document, it clearly stated it was seeking either a modification of petitioner's rate or a denial of petitioner's certificate application. It also requested the Commission to vacate the temporary certificate previ-

ously issued to petitioner. The Commission's order granting intervention to Oklahoma Natural dealt with all of these various contentions. The purpose of granting intervention, it said, was to allow Oklahoma Natural to show, more specifically, what interest it had in this proceeding as a matter of fact and as a matter of law. With respect to the temporary certificate the Commission said Oklahoma Natural's interests were not prejudiced because such a temporary authorization involved no commitment that any particular rate would be authorized. This statement does no more than confirm the fact that rates are authorized only under the rate sections of the Act and not under the certificate provisions of Section 7. Finally, the Commission, in dealing with the protest filed by Oklahoma Natural noted that petitioner had made an initial rate filing under its rules and that it had no power to reject such a filing.

In this context, and since the subsequent order of the Commission granting intervention to Lone Star and the municipalities (J. App. 307a) was routine in character, petitioner could only speculate upon the intention of the Commission. The most limited view of the order is that since Oklahoma Natural alternatively sought a denial of petitioner's application, intervention was granted for that purpose alone. Again, because the Commission said Oklahoma Natural should show what interest it had in this proceeding as a matter of fact and as a matter of law, it might be presumed that the Commission intended to review the evidence to be submitted by Oklahoma Natural for the purpose of deciding whether it was appropriate to initiate a rate investigation under Section 5(a).

That the Commission had no clearly defined intention to investigate petitioner's rate during the course

of the certificate proceeding is emphasized by its order of February 4, 1955 (J. App. 321a) denying a motion to dismiss filed by the municipal interveners, who had contended that petitioner's application should be dismissed *in toto* because petitioner had not presented a utility rate base cost-of-service study or comparable data similar to that required by interstate pipeline transporters in the certificate applications filed by that class of natural gas company. This order was issued more than two months after the hearing had ended, while the presiding examiner still had the matter under consideration. In this order the Commission said: "Whether Signal (petitioner) has justified or must justify its proposed 12 cents per Mcf rate is a matter for argument in briefs and determination in the ultimate decision of this case."

In October 1954, no body of administrative precedent had then been evolved respecting the precise matters and issues that should properly be considered by the Commission in disposing of an independent producer certificate application. The only guideposts available to petitioner were the requirements of Section 7(e) of the Act itself and the Commission's regulations under the Act dealing with the certificate applications of independent producers.[14] Petitioner's certificate appli-

[14] There is a striking difference between the certificate regulations applicable to an independent producer and those applicable to an interstate pipeline transporter. No provision is made in the regulations for an independent producer to obtain a certificate to construct facilities, while the regulations applicable to interstate gas pipeline transporters (18 CFR 157.5-.22) are primarily concerned with construction, costs, and revenues in order to determine the economic feasibility of the construction. An independent producer has already incurred the costs incident to drilling wells and building gasoline plants before he applies for a certificate. Hence economic feasibility is not an important question in an independent producer certificate case.

cation and the evidence and testimony it presented fully met the requirements of both the statute and the Commission's Regulations applicable to it.

If rates may properly be considered definitively in a certificate proceeding at all, the Commission had a duty to advise petitioner that it desired to investigate petitioner's rate and determine a just and reasonable rate for its sale of gas to Cities Service in order to assure petitioner of a fair hearing. To do less would not even constitute a gesture of due process. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950).

The principles enunciated by this Court in the *Morgan* case, *supra,* are clearly controlling here. Indeed, the Commission's action in this case is an even more flagrant disregard of the essentials of a fair and adequate hearing than was involved in *Morgan.* In the *Morgan* case, appellants were advised that the hearing was to be concerned with an inquiry into the reasonableness of their rates and the final order was held invalid because no specific complaint was formulated by the Government. Here, there is a total absence of a notice of any inquiry into petitioner's rate. The fact is that the proceeding in this case was initiated and concluded under a section of the Act which dealt not with rates but with certificates of public convenience and necessity.

Moreover, it is not enough to satisfy the requirement of a fair hearing that petitioner had the right under the Natural Gas Act to apply for a rehearing of the final order of the Commission granting petitioner a certificate. This Court has clearly held in *Gonzales* v. *United States,* 348 U.S. 407 (1955), that the right to a rehearing offers too little protection be-

cause the right to present one's side of the case is broader than the right to correct "errors" in the final order issued. In *Gonzales,* the Court cited its opinion in the *Morgan* case as correctly stating the essentials of a fair hearing in a quasi-judicial proceeding before an administrative agency.

What petitioner was entitled to, but did not receive, was a proper notice that the Commission intended to investigate petitioner's rate similar to the notice given in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333, 349 (1938), cited with approval by this Court in denying a rehearing to the Government in the *Morgan* case, 304 U.S. 22 (1938).

Plainly, the Commission has denied petitioner a fair and adequate hearing with respect to petitioner's rate, as that rate has been initially established in the sales contract negotiated with Cities Service, contrary to the principles established by this Court in the *Morgan* case and re-affirmed in the *Gonzales* case.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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